IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANGELIA M. ANDERSON	:	
	:	
v.	:	CIVIL NO. CCB-08-3
	:	
UNITED STATES OF AMERICA	:	

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MEMORANDUM

The United States, the defendant in this case, requests that the court reconsider its decision to stay this proceeding instead of dismissing it without prejudice and, in the alternative, asks that the court lift the stay to permit further filings. The plaintiff, Angelia M. Anderson ("Ms. Anderson"), also requests that the court re-open the case to proceed on the merits. Ms. Anderson seeks damages, pursuant to the Federal Tort Claims Act ("FTCA"), for injuries she allegedly sustained as a result of negligent care she received at the Veterans Administration Medical Center in Baltimore, Maryland ("VA Hospital"). The issues have been fully briefed and no hearing is necessary. For the following reasons, the court will deny the defendant's motion for reconsideration and will grant both parties' motions to lift the stay.[1]

[1]Also pending before the court is the defendant's October 20, 2008 motion to strike plaintiff's references to the parties' settlement discussions, which was attached to another of defendant's motions to lift the stay. In accordance with Federal Rule of Evidence 408, which makes inadmissible certain evidence pertaining to settlement negotiations, the court will grant the motion to strike, *see Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988), as to the referenced exhibits. Information contained in the complaint and the plaintiff's memoranda will be disregarded rather than stricken, except that the court will consider, to the extent relevant, the fact that settlement negotiations were ongoing during a significant period of time. Federal Rule of Evidence 408, of course, does not exclude evidence of settlement negotiations offered for a purpose other than proof of liability or invalidity of the claim. *Id.*

BACKGROUND

On January 2, 2008, Ms. Anderson filed her original complaint in this court alleging that she received negligent medical care at the VA Hospital, which caused severe and permanent disability, unending physical pain, and emotional anguish, among other injuries. Specifically, she claimed that, despite presenting to the VA Hospital complaining of back pain on several occasions in the late summer and fall of 2002, the VA Hospital failed to (1) adequately examine her; (2) diagnose the presence of an epidural spinal tumor which developed as a consequence of her known cancer; and (3) refer her for timely surgical intervention. Her complaint further alleged that, in accordance with FTCA requirements, she filed a tort claim with the appropriate VA agency on December 17, 2003, and the claim was denied on September 26, 2007.

The United States moved to dismiss the complaint without prejudice on the basis that Ms. Anderson failed to comply with the Maryland Health Care Malpractice Claims Act ("HCMCA"), which establishes several requirements that must be met before certain medical malpractice actions may be filed. Specifically, Ms. Anderson failed to present her claim to the Director of the Maryland Health Claims Alternative Dispute Resolution Office ("HCADRO") accompanied within 90 days by a certificate of qualified expert attesting to the VA Hospital's departure from standards of care and that the departure proximately caused her injuries. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(a)(1)(i) & (b)(1)(i).

On August 8, 2008, the court held that HCMCA's requirements applied in the FTCA context and stayed the proceedings to allow Ms. Anderson to comply by filing her claim and certificate of qualified expert with HCADRO. On August 26, 2008, Ms. Anderson submitted the

requisite filings with HCADRO, which transferred her claim to this court on September 2, 2008.[2] On September 23, 2008, the plaintiff re-filed her complaint in this court, which was docketed under a new case number (CCB-08-2488).

Meanwhile, on August 22, 2008, the United States filed a motion asking the court to reconsider its order to stay the proceedings, contending that Ms. Anderson's failure to comply with HCMCA mandated a dismissal without prejudice. In the alternative, the defendant asked the court to lift the stay to permit the filing of another motion to dismiss based on Maryland's three-year statute of limitations applicable to claims against health care providers.[3] In response to her second complaint, the United States filed a motion to dismiss in that case, arguing that Ms. Anderson's claim was time-barred by the FTCA's six-month statute of limitations, *see* 28 U.S.C. § 2401(b). Ms. Anderson subsequently moved that the court re-open this case, which had been stayed and administratively closed by the court's August 8 order.

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[2]The court notes that the plaintiff opted unilaterally to waive arbitration before HCADRO when she submitted her claim, which is permitted under HCMCA, *see* Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06B, and explains the speedy transfer back to this court.

[3]As indicated above, both parties' motions to lift the stay will be granted, and the defendant may file subsequent motions as appropriate. The court notes, however, that while courts look to state law to determine the existence of an underlying cause of action, "federal law defines the limitations period" of an FTCA claim. *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991). Accordingly, a motion to dismiss predicated solely on the plaintiff's failure to comply with Md. Code Ann., Cts. & Jud. Proc. § 5-109 likely would be futile. The court further notes that holding the plaintiff to both federal and state statutes of limitations could have doomed her case from the start. Ms. Anderson complied with the federal statute by timely submitting her claim to the VA, *see* 28 U.S.C. § 2401(b), but the VA did not deny her claim until September 2007, well after the state's three-year statute of limitations expired.

ANALYSIS

Courts have generally recognized three grounds for granting a motion for reconsideration: (1) an intervening change in controlling law; (2) to account for new evidence; or (3) to correct a clear error of law or prevent manifest injustice. *See EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Potter v. Potter*, 199 F.R.D. 550, 552 & n.1 (D. Md. 2001). Although "there are 'circumstances when a motion to reconsider may perform a valuable function,' ... it [is] improper to use such a motion to 'ask the Court to rethink what the Court ha[s] already thought through-rightly or wrongly.'" *Potter*, 199 F.R.D. at 552 (quoting *Above the Belt, Inc. v. Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

The crux of the United States's argument is that the court acted outside of its discretion, and thus committed clear error, by granting a stay in this case, as opposed to dismissing the case without prejudice. The court disagrees. The defendant points to state cases suggesting that where a claimant fails to satisfy the HCMCA's preconditions the state court must dismiss the action. *See, e.g., Manzano v. S. Md. Hosp., Inc.*, 698 A.2d 531, 533 (Md. 1997); *but see Jewell v. Malamet*, 587 A.2d 474, 481 (Md. 1991) (ordering a stay of state court proceeding where claimant failed to satisfy precondition). The United States puts forth no precedent, however, for its argument that a federal district court exercising its federal question jurisdiction *must* dismiss such claims.

Indeed, the Fourth Circuit has never so held. Rather, the Fourth Circuit has explicitly required federal district courts sitting in diversity to enforce the precondition. *See Rowland v. Patterson*, 882 F.2d 97, 99 (4th Cir. 1989) (citing *Davison v. Sinai Hosp. of Baltimore, Inc.*, 462 F.Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980) as a "diversity action properly

dismissed for failure to comply with precondition"). Because this court held that the precondition applies in the FTCA context, it was similarly required to enforce that precondition, which it did by requiring the claimant to comply with the HCMCA before permitting her FTCA claim to proceed on the merits. Absent some showing that the court had no discretion to issue a stay as the method of enforcement, the defendant is not entitled to a different result. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (noting that "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion") (internal citations omitted).[4]

Moreover, the court notes that it opted to stay the proceedings, rather than dismiss the action without prejudice, because the FTCA's strictly-enforced statute of limitations would likely have barred a subsequently-filed claim. In state court, where a failure to satisfy the precondition almost always requires dismissal of the action without prejudice, a claimant has the benefit of much lengthier statutes of limitations in which to re-file after complying with the precondition. The same is true for claimants suing in federal court based on the parties' diversity. As noted above, claimants suing pursuant to state law also have the benefit of clearly established authority that they must comply with the HCMCA before filing a medical malpractice claim. Accordingly, where a claimant is subsequently time-barred due to a failure to exhaust this remedy, such an outcome, while harsh, is entirely foreseeable. In contrast, the court opted to

[4]The case relied on by the government, *Mizrach v. United States*, No. 1:08-CV-2030 (D. Md. Feb. 17, 2009), does not require a different result. In *Mizrach*, an FTCA case, Judge Davis of this court relied on *Lewis v. Waletzky*, 576 F.Supp.2d 732 (D. Md. 2008), for the proposition that dismissal without prejudice is appropriate when a claimant fails to satisfy HCMCA's preconditions. While Judge Davis concluded a stay was not warranted in that case, neither his opinion nor *Lewis* suggests that the court does not have the discretion to stay rather than dismiss when necessary to avoid an inequitable result.

preserve the legal claim in this case both due to the likely time bar of a subsequent filing and the close question whether FTCA claimants must comply with the HCMCA prior to filing suit. *See Jewell*, 587 A.2d at 480-81 (issuing stay of state court proceeding to allow claimant to fulfill HCMCA's precondition and preserve state law claim in light of close question as to whether HCMCA applied); *cf. Rhines*, 544 U.S. at 275-78 (discussing the district court's discretion to stay certain habeas petitions to permit exhaustion of claims at the state level in light of federal statute's one-year limitations period). Significantly, the government complains that it did not have the benefit of Maryland's pre-filing arbitration requirement "to encourage early settlement" (Def.'s Mem. Reconsideration at 7) but fails to note that (1) the condition can be waived unilaterally by the plaintiff in any event, and (2) more importantly, the government had the benefit of the years between December 2003 and September 2007 when it was negotiating, presumably in good faith, with the plaintiff toward a satisfactory resolution. Arguing now for a dismissal that would likely bar subsequent re-filing does not advance the ends of justice.

In short, the defendant has failed to demonstrate that the court made a clear error of law by granting a stay of this proceeding. Accordingly, the court will deny its motion for reconsideration, and the court will grant both parties' motions to lift the stay. Further, because no responsive pleading has been filed in the second case (CCB-08-2488), *see Smith v. Blackledge*, 451 F.2d 1201, 1203 n.2 (4th Cir. 1971), the court will treat the plaintiff's motion to lift the stay as a voluntary dismissal of that case without prejudice. As such, the defendant's motion to dismiss that case will be denied as moot. Separate orders follow.

March 26, 2009
Date

/s/
Catherine C. Blake
United States District Judge

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ORDER

For the reasons and to the extent stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. the defendant's motion for reconsideration or, in the alternative, to lift the stay (docket no. 13) is **DENIED in part** and **GRANTED in part**;

2. the defendant's motion to lift the stay and motion to strike references to settlement discussions (docket no. 19) is **GRANTED in part** and **DENIED in part**;

3. the defendant's motion to lift the stay for the filing of notice of supplemental authority (docket no. 20) is **GRANTED**;

4. the plaintiff's motion to re-open the case (docket no. 10 in CCB-08-2488) is **GRANTED**, and

4. the Clerk shall **RE-OPEN** this case.

March 26, 2009
Date

/s/
Catherine C. Blake
United States District Judge